though it was the intention of the Rules that the application for summary judgment should be made before a defence had been delivered in ordinary course, the plaintiff was not precluded from making it afterwards, but in such an event the onus is cast on the plaintiff of showing why he did not apply sooner.

In the instant case the plaintiffs sought to explain the long delay by the affidavit of one Mohd. Adib Haji Idris affirmed on April 20, 1984. Mohd. Adib said that he had been the plaintiffs' Deputy Manager in charge of operations since July 1979. He went on to explain that the plaintiffs had gone into receivership on February 25, 1982 upon the crystallisation of a debenture made between the plaintiffs and United Malayan Banking Corp. Bhd. I gathered from Mohd. Adib's affidavit that the plaintiffs apparently were owing some $27 million to various creditors against some $63 million due to the plaintiffs from various debtors. The Receivers and Managers appointed pursuant to the said debenture were faced with the task of, *inter alia*, finding out what amounts were due to the plaintiffs and where necessary filing actions for the recovery of the same. To avoid some of the actions being barred by limitation, the plaintiffs took out proceedings against various alleged debtors not necessarily after making a thorough study of the claims, one of which was the instant case. Encik Mohd. Adib Haji Idris went on to explain that the Receivers and Managers only came to know that the 1st defendant disputed the claim alleging breach of warranty and rescission of the agreements when the defence and counterclaim was filed. They had then embarked on an investigation to find out whether there were any merits in the contention of the 1st defendant. Encik Mohd. Adib went on to point out that the staff of the plaintiff company had been reduced from the 320 or so persons that it had before it went into receivership to only about 32. In the circumstances, there was the delay of the Receivers getting to appreciate the merits (or lack of it) of the contention of the 1st defendant and hence the delay in taking out Order 14 proceedings.

In the face of the fact that the plaintiff company was (and is) in receivership and that the action was filed at the instance of the Receivers and Managers working with some 10% of the original staff and in the face of there being nothing in the plaintiff company's records of the alleged rescission of the contracts (it turned out that the 1st defendant admits that the alleged rescission of the hire purchase contracts were made orally), I was satisfied that the delay in taking out the application had been adequately explained.

On the estoppel point, reference can be made to Order 18 rule 3. Upon the defendant serving upon the plaintiff a defence and counterclaim and where the defence calls for a reply, the plaintiff is required by the rules to include in the same document both a reply and defence to counterclaim and have it served on the defendant before the expiration of 14 days after the service on him of the defence and counterclaim.

In the face of that prescribed time frame and the fact that where a defence to counterclaim is not filed and served in due time default judgment could be entered against the plaintiff, and where the plaintiff can justify not taking out Order 14 proceedings until after delivery of the statement of defence, the fact that a reply and defence to counterclaim was filed does not have the effect of precluding the plaintiff from proceeding with the Order 14 application. The freezing of the running of time where Order 14 proceedings are instituted applies only in the situation where the Order 14 proceedings are instituted before the time to deliver the defence has expired.

Order accordingly.

Solicitors : *Skrine & Co.; Joseph Tan & Tang.*

MAA HOLDINGS SDN. BHD. & ANOR. v. NG SIEW WAH & ORS.

[O.C.J. (George J.) October 11, 1984]

[Kuala Lumpur – Civil Suit No. C532 of 1982]

Contract – Contract for the sale of all shares of a company owning land – Full payment made by purchaser – Purchaser to apply for approval of Foreign Investment Committee (FIC) – Sale not to be effected by late approval of FIC – Failure to apply to FIC – Contract can still be specifically enforced – Agency – Agent acting for undisclosed principal – Undisclosed principal can enforce contract – Contracts Act, 1950, ss. 183-186.

In this case the second plaintiff acting as agent of the first plaintiff (undisclosed principal) had entered into an agreement with five defendants (who were the only shareholders of Leeng Land Sdn. Bhd.) to purchase their shares for $8.1 million. $2 million were paid at the time of the execution of the agreement, balance of $6.1 million was

paid later within the extended time according to the agreement. The said amounts were paid to the vendors' solicitors. On full payment the vendors were to hand over all share certificates together with transfer deed in escrow to the solicitors for handing over to the purchasers. Purchasers were also to apply to Foreign Investment Committee for approval of the sale, however late approval or non-approval would not affect the sale. Even after full payment the vendors did not hand over the share certificates to the solicitors. The plaintiffs then brought an action for specific performance of the contract. The defendants raised an objection as regards the *locus standi* of the first plaintiff as the agreement was entered into only with the second plaintiff. The defendants also took the plea that they were not bound by the agreement as approval of FIC had not been sought.

Held: (1) the vendors all along knew that the second plaintiff was acting for an undisclosed principal. An undisclosed principal might require the performance of the contract and as such he had the *locus standi* as a plaintiff;

(2) the purchasers had fulfilled their part of the contract by paying the total purchase consideration in full;

(3) the agreement itself provided that the sale of shares would not be affected by the late approval or non-approval of the Foreign Investment Committee;

(4) this was a case involving the purchase of land by means of the purchase of the shares of the company owning land and as such was a proper case for specific performance.

Cases referred to:

(1) *Australian Hardwoods Pty. Ltd.* v. *Commissioner for Railways* [1961] 1 W.L.R. 425.
(2) *Measures Brothers Ltd.* v. *Measures* [1910] 2 Ch. 248.
(3) *Wickman Machine Tool Sales Ltd.* v. *L. Schuler A.G.* [1972] 1 W.L.R. 840.
(4) *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26
(5) *Mersey Steel and Iron Co.* v. *Naylor Benzon & Co.* (1884) L.R. 9 App. Cas. 434.
(6) *Davidson* v. *Gwynne* 12 East 380, 389; 104 E.R. 149.
(7) *Vishram Arjun* v. *Shankariah* A.I.R. 1957 Andhra Pradesh 784.
(8) *Ho Kok Cheong Sdn. Bhd. & Anor.* v. *Lim Kay Tiong & Ors.* [1979] 2 M.L.J. 224.
(9) *Societe Italo-Belge* v. *Palm Oils* [1982] 1 All E.R. 19, 26, 27.
(10) *W.J. Alan & Co. Ltd.* v. *El Nasr Export & Import Co.* [1972] 2 Q.B. 189.

CIVIL SUIT.

Zainur bin Zakaria for the plaintiffs.
Izabella E.H De Silva for the defendants.

Cur. Adv. Vult.

George J. : On September 28, 1981 M/s. Skrine & Co., Advocates and Solicitors of Kuala Lumpur wrote their letter (AB2) to M/s. Shook Lin & Bok informing them that they act for one Encik Zachariah bin Mohd. Tasa, the nominee of the intending purchaser of the "Company and the property belonging to the Company", the company being one Leeng Land Sdn. Bhd., and requiring M/s. Shook Lin & Bok as the vendors' solicitors to "prepare the agreement as soon as possible . . ." A clearer picture of what was happening is provided by the sale and purchase agreement prepared (presumably pursuant to AB2) by M/s. Shook Lin & Bok and entered into by the said Zachariah bin Mohd. Tasa as purchaser on the one part and the five persons who between them owned all the issued shares in the said Leeng Land Sdn. Bhd. as vendors on the other part, for the sale and purchase of all the issued shares in the company for $8.1 million.

The instant action for specific performance of the agreement was brought against the vendors by Zachariah bin Mohd. Tasa as well as by one MAA Holdings Sdn. Bhd. who, the plaintiffs claim, were the real purchasers and who had nominated Zachariah bin Mohd. Tasa to enter into the sale and purchase agreement. The plaintiffs seek to read the said letter dated September 28, 1982 as part of the evidence. For the defendants it has been contended that by Section 91 of the Evidence Act, the letter is inadmissible, and without which the 1st plaintiff has no *locus standi*. Reference was also made in paragraph 2 of the statement of defence to clause 17 of the agreement that prohibited the purchaser from parting with the rights given to him by the agreement. However, the plaintiffs' claim is not on that basis but that *ab initio* the 1st plaintiff was the undisclosed principal of the 2nd plaintiff and that at all relevant times the defendants were aware that the 2nd plaintiff in fact was acting as agent for an undisclosed principal. Counsel for the defendants did not pursue with the clause 17 prohibition point.

It is not uncommon that in mercantile transactions one party acts as agent for an undisclosed principal. The law recognises that and the rights of the parties to a contract made by an agent of an undisclosed principal have been codified in sections 183 to 186 of the Contracts Act. Section 184 goes to the extent of providing that the undisclosed principal may require the performance of the contract even though the other party to the contract neither knew or had reason to suspect that the person he had dealt with was in fact an agent.

In the instant case it is not irrelevant to observe that in the said written agreement, the plural is

used with reference to the purchaser at least 4 times, once in clause 1, twice in clause 4 and once in clause 3(b).

In my judgment, on the facts of the case, the fact (and not more) that the agent was at all relevant times functioning as an agent for an undisclosed principal may be proved without offending against the provisions of sections 91 and 92 of the Evidence Act which sections, in the context, have to be read with sections 183 and 186 of the Contracts Act. Such a fact *per se* does not tantamount to contradict, vary, add or subtract from the terms of the contract.

Accordingly I hold that the document AB2 was properly admitted and read. I find as a fact that at all relevant times the 1st plaintiff was the principal of the 2nd plaintiff who entered into the sale and purchase agreement with the defendants as agent for the 1st plaintiff. The contention that the 1st plaintiff has no *locus standi* fails.

At the time or prior to executing the sale and purchase agreement the defendants had been paid $2 million of the agreed purchase price of the shares. By clause 3 of the agreement the balance of $6.1 million was to be paid "to the vendors' solicitors M/s. Shook Lin & Bok . . . on or before December 31, 1981. . ."

There was provision for the extension of the time in which event certain agreed interest had to be paid. The extension was sought and obtained and within the extended period the sum of $6.1 million (and the amount of agreed interest for the extension) was paid to M/s. Shook Lin & Bok who issued a receipt dated January 23, 1982 for the same "being payment of balance purchase price..."

By paragraph 9 of the statement of defence, the defendants had denied that the balance had been paid. All they were prepared to concede to was that they had been informed by M/s. Shook Lin & Bok that "a sum equivalent to the balance ... was deposited with them as stakeholders."

The issue as to whether the balance had been duly paid appeared to have been abandoned by Counsel for the defendants, no doubt because the relevant correspondence (AB39, AB43, AB47 and AB50) and the receipt AB40 make it abundantly clear, and I so hold, that the balance of the agreed purchase price had in fact been duly paid which the same documents show was the position that had been accepted by the parties themselves at all relevant times.

The next issue for consideration is the effect of the alleged breach of clause 2 of the agreement which reads as follows:

> "2. The Purchaser shall forthwith after execution of this Agreement apply to the Foreign Investment Committee for approval of the transaction herein and shall endeavour to obtain such approval within three (3) months from the date hereof. It is hereby agreed that the sale of the said Shares shall not be affected by the late approval or non-approval of the Foreign Investment Committee and all the terms of payment shall continue to be effective and binding notwithstanding any late approval or non-approval of the Foreign Investment Committee."

The application for the approval was never made.

Now, clause 5(a) has a reference to clause 2 *viz:*

> "5(a) It is hereby expressly agreed between the parties hereto that if the Purchaser fails to pay any of the instalments within the stipulated time or any extension thereof as mentioned under Clause 2 hereof, the Vendors shall be entitled to forfeit all sums thencetofore paid by the Purchaser to the Vendors . . ."

Clearly there is a typographical error. Clause 2 does not provide the stipulated time for the payment of the purchase price. It does not provide for any extension of the stipulated time for payment either. It is clause 3 that does that. A perusal of the agreement as a whole shows that to give a meaning that is not absurd to clause 5(a) and which will be in harmony with the rest of the terms of the agreement, "clause 2" in clause 5(a) should be read as "clause 3". Accordingly what in fact clause 5(a) provides is for forfeiture of the deposit of $2 million in the event the balance of $6.1 million is not paid within the three months stipulated by clause 3 or within four months if there had been the extension provided for by clause 3 which in fact was the position in that the extension was sought and obtained. The balance of $6.1 million (and the interest for the extension) was, as has been seen, duly paid within the stipulated period. The vendors were and are not entitled to forfeiture pursuant to clause 5(a).

Another typographical error is seen in clause 8 where reference is made to "any of the warranties given by the Vendors in Clause 6 hereof ..." That this is an obvious typographical error can be seen from the fact that clause 6 does not provide or have reference to any warranties. The warranties given by the vendors are in clause 7. Clearly the

agreement should be read with the words "clause 6" in clause 8 being replaced with the words "clause 7".

Raja Abdul Aziz Addruse, counsel for the plaintiffs in contending that the non-application for the Foreign Investment Committee (FIC) approval did not entitle the defendants to treat the contract as discharged contends that there is yet another typographical error which is in clause 6 where he says the reference to clause 2 should in fact be a reference to clause 3. It is contended that without such an amendment clause 6 is not in harmony with the rest of the terms and in fact makes for some absurdity. Clause 2 has been reproduced hereabove. Clause 6 as follows:

"6. It is also further agreed between the parties hereto that if the Purchaser complies with Clause 2 hereof and the Vendors fail to comply with their obligations under this Agreement to complete the sale the Purchaser shall be entitled to specific performance and all other legal remedies and damages available to them or alternatively at the choice of the Purchaser the return of all sums paid to the Vendors without interest."

I find that it is indeed odd that the purchasers could insist on specific performance simply because they had sent in an application for FIC approval when clause 2 itself shows that the parties took the view that the outcome of the application was not important. This entitlement, at the option of the purchaser, for specific performance on the failure on the part of the vendors to complete the sale when the requirements of clause 2 had been met and when the requirement of clause 3 to pay up the balance of the agreed purchase price may not have been met, makes for an absurdity. To my mind it is clear that the most important obligation on the part of the purchasers in the instant case, as is the position in most sale and purchase agreements, was to effect payment of the agreed purchase price.

I pause here to look at clause 4 of the agreement. This provides for the vendor to deposit with stakeholders the share certificates together with the relevant memoranda of transfer duly executed in escrow in favour of the purchasers, the resignation of the vendors as directors of the company also executed in escrow and a resolution also executed in escrow appointing "the purchaser or their nominees as directors". These documents have to be deposited after execution of the agreement. Clause 4 also provides a mandatory requirement that the stakeholders release the documents to the purchasers "upon their full settlement of the balance of the purchase price". The usage of the plural with reference to the purchaser, that had been pointed out herebefore, is to be noted. However the real importance of this clause in the context of this trial is that it shows that once full payment was effected the vendors were committed to complete the sale. And it seems obvious to me that what the parties intended was to provide by clause 6 for specific performance in the event the whole of the $8.1 million had been duly paid and not to provide for specific performance in the event FIC approval had been applied for. The stipulation for payment of the balance of the purchase price is in clause 3. It follows that the compliance required by clause 6 has to be a compliance with clause 3 of the agreement and not of clause 2. That would do away with the absurdity referred to herebefore and give a meaning to clause 6 that harmonises with the rest of the agreement and is in accord with common sense. Mrs. De Silva of Counsel for the defendants has contended that this aspect of the matter was not pleaded and since it was not, is not an issue. I, however, think that paragraph 4 of the Reply covers the point.

In my judgment there is a typing error in clause 6 and in construing the agreement I have to and do read clause 6 by substituting the words "clause 2" therein with the words "clause 3".

Mrs. De Silva has relied on the reading of clause 6 without the said substitution to submit that because of clause 6 the compliance of clause 2 of the agreement is a condition precedent to the purchaser seeking specific performance of the agreement in that there was interdependence between the two clauses. *Australian Hardwoods Pty. Ltd.* v. *Commissioner for Railways*[1] and *Measures Brothers Ltd.* v. *Measures*[2] were cited.

However in view of my finding that there was that typographical error in the agreement as typed out, the interdependence is in fact between clauses 6 and 3 and not between 6 and 2.

Wickman Machine Tool Sales Ltd. v. *L. Schuler A.G.*[3] is authority for the proposition that the function of the Court (in the context) is a strictly limited one namely, to give effect to the intention of the contracting parties as expressed in the language they employed in their concluded agreement, and that it is competent to the contracting parties to make the actual existence of anything a condition precedent to the inception of any contract and provided that has been made with clarity it is needless to inquire into the materiality of a breached term to the main purpose of the contract.

However the materiality of the breached term to the main purpose of the contract becomes relevant where the contract has not expressly or by clear implication made the term a condition precedent. In *Wickman Sales* (*supra*) a reference was made to the *Hongkong Fir*[4] case, *viz:*

"... In the *Hongkong Fir* case Diplock L.J. was dealing with circumstances where, regarding the contract as a whole, it was impossible to determine satisfactorily whether certain of its terms fell into either (and, if so, which) of the categories of 'conditions' and 'warranties'; and he held that in such circumstances regard should be had to the consequences of non-compliance, pointing out that it is the drastic effect of the breach upon the contractual objectives which may in such cases release the innocent party from further performance of his obligations. It was in that way that the decision was regarded in *Harbutt's 'Plasticine' Ltd.* v. *Wayne Tank & Pump Co. Ltd.* [1970] 1 Q.B. 447."

Particularly as I have corrected what I have held to be a typographical error in clause 6 by substituting "clause 2" there with "clause 3" and in any event the materiality of the purchaser not making the application required to be made by clause 2 of the agreement has to be enquired into to arrive at a decision as to whether, there having been a breach of clause 2, the vendors were entitled to rescind since not every failure to perform entitles the other party to treat the contract as discharged.

The Courts have distinguished between conditions and warranties, a breach of a condition entitling the other party to treat the contract as discharged while a breach of warranty sounding only in damages.

Another test applied has been to decide whether the provisions are independent or dependent. Independent provisions are illustrated by a tenant's convenant to pay rent and the landlord's covenant to repair: each is independent of the other and it has long been established that the tenant is not excused from paying rent even though the landlord has failed in his covenant to repair.

In order to provide for a more just test the Courts began to distinguish the more serious breach (which entitles the party to rescind) from the less serious breach (which entitles the other party only to damages). The question asked was whether the term breached is a fundamental or essential term. Lord Blackburn in *Mersey Steel and Iron Co.* v. *Naylor Benzon & Co.*[5] asked whether the failure to perform one part of the contract went to the root of the contract.

In the *Hongkong Fir* case Upjohn L.J. thought (at p.63) that the rule was best stated by Lord Ellenborough C.J. in *Davidson* v. *Gwyne:*[6]

"The principle laid down in *Boone* v. *Eyre* has been recognised in all the subsequent cases, that unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages."

In *Vishram Arjun* v. *Shankariah*[7] the test applied was whether the term in the contract that was breached was essential to the main purpose of the contract.

As has been seen, the parties having by clause 2 provided for the purchaser to "forthwith" apply to the FIC for approval of the transaction, qualified and watered down that requirement by the second limb of that clause itself by the proviso that the sale of the shares was not to be affected by the late approval or even "non-approval" of the Foreign Investment Committee.

My attention has been drawn to the "Guidelines for the Regulation of Acquisition of Assets, Mergers and Takeovers" issued by the Government. The "guideliness" are no more than just that, that is, guidelines for the implementation of the Government's policy of achieving a more balanced Malaysian participation in ownership and control of certain assets, business and companies, an aspect of the so-called New Economic Policy (NEP).

Now, the establishment of the FIC and the provision in the guidelines for obtaining the FIC approval are simply means to try and ensure that the NEP is implemented.

No doubt some aspects of the guidelines have been the motivating factor for the passing of relevant laws but the "guidelines" themselves have not the force of law and the need to obtain FIC approval for the acquisition of assets is not a statutory requirement. In fact a transaction could be in full accord with the NEP although FIC approval was not sought and obtained.

The public policy aspect of the matter was discussed by Counsel for the plaintiffs. Reference was made (in the context of illegality of a contract) to the scope of public policy as set out in *Chitty* on Contracts (25th Edition) paragraph 1034 at page 548:

"Scope of public policy. Objects which on grounds of

public policy invalidate contracts may, for convenience, be generally classified into five groups: first, objects which are illegal by common law or by legislation; secondly, objects injurious to good government either in the field of domestic or foreign affairs; thirdly, objects which interfere with the proper working of the machinery of justice; fourthly, objects injurious to marriage and morality; and, fifthly, objects economically against the public interest."

Chitty itself recognises that certain cases do not fit clearly into any of these categories but here we need not have to be concerned with that. For the purposes of the instant case it can be said that the second and fifth of the said categories may be relevant.

The defendants have to show that the object of the contract falls into one or both those categories (or of any of the other categories). To do which they would have had to satisfy the Court that the NEP has come to be accepted as public policy and is not just the Government's political policy – see Wan Hamzah J.'s judgment in *Ho Kok Cheong Sdn. Bhd. & Anor.* v. *Lim Kay Tiong & Ors.*[8] and that the object of the contract runs foul of the NEP. This they have not tried to do or if they had, have not succeeded in doing.

Accordingly it is my judgment that the provision for seeking FIC approval in clause 2 of the agreement was an independent term not essential or fundamental to the primary object of the contract. It is a provision the breach of which does not go to the root of the contract. As has been seen the parties themselves have by clause 2 itself expressed their views on the effect of FIC approval:

". . . all the terms and conditions herein inclusive of the terms of payment shall continue to be effective and binding notwithstanding any late approval or non-approval of the Foreign Investment Committee."

The vendors were not entitled to consider themselves as discharged from their obligations under the contract because of the breach on the part of the purchasers of the requirements of clause 2 of the agreement. The breach of clause 2 sounds only in damages if any such damage had occurred by the breach.

An alternative plea by the plaintiffs is that contained in paragraph 6 of the Reply – that the defendants' conduct, particulars of which are given in paragraph 6, was such that in any event they are estopped from alleging that the 2nd plaintiff had breached clause 2 of the agreement or from relying on the alleged breach.

As has been seen, clause 4 provides for the release to the purchasers of the share scripts with duly executed memoranda of transfer (and all the necessary documents duly executed necessary to complete the transaction) forthwith upon settlement of the balance of the purchase price. Clause 3 refers to the date of payment as being the completion date. The contract clearly provides for the transaction to be completed on the completion date. Full payment of the balance was effected as required by clause 3 of the agreement. This was on January 23, 1982. January 23, 1982 thus became the completion date.

If the vendors had duly met their obligations they would have had deposited with the stakeholders those documents after the execution of the agreement and in good time to enable the stakeholders to "forthwith release ... the documents... upon... full settlement of the balance of the purchase price." It is to be noted that the only condition precedent to the release of the documents imposed by clause 4 is the full settlement of the balance of the purchase price.

The documents, if they had been with the stakeholders, would have been released on or soon after January 23, 1982. However the documents had not been deposited as required by clause 4 or at all.

Even after that large amount of $6.1 million (and interest) had been paid on January 23, 1982 there was no reaction of any sort from the vendors. Some 20 days later on February 13, 1982 the 2nd plaintiff wrote two letters to the vendors' solicitors each copied to Lee Kok Kuang who was considered by him to be the "spokesman" for the vendors. By one of those two letters the 2nd plaintiff reminded the vendors of the need to pay to Asia Commercial Finance (M) Bhd. some $2.5 million by March 1982. In both the letters he shows his anxiety at the total lack of reaction on the part of the vendors. The next thing that happened seems to have been the discharge of M/s. Shook Lin & Bok from acting as the solicitors for the vendors. This was at or about the end of February 1982. On March 1, 1982 the 2nd plaintiff's solicitors wrote to the said Asia Commercial Finance (M) Bhd. enquiring what was owing to them. This letter was copied to the former solicitors for the vendors (and stakeholders) M/s. Shook Lin & Bok, their new solicitors M/s. Sri Ram & Co. and to Lee Kok Kuang.

On March 2, 1982 there was at last a reaction from the erstwhile silent vendors. By a letter of

that date they enquired whether the 2nd plaintiff had applied for FIC approval. It is to be noted that this was some 38 days after the said date of completion.

I entirely agree with Raja Abdul Aziz Addruse's submission that even if the vendors' "silence & indifference could be excused for the period up to the payment of the balance, there can be no excuse for their continued indifference after the payment was made because upon the payment being made –

(a) they must be taken to have known of the clear intention of the 2nd plaintiff to complete the purchase;

(b) they must be taken to have been aware of their obligation under clause 4;

(c) they would have been put to inquiry as respects the need to have the 2nd plaintiff comply with Clause 2;

(d) they would have known that, in relation to the substantial amount involved in the payment of the balance of the purchase price ($6.1 m), the 2nd plaintiff would be put to financial loss in the form of loss of interest alone – at 12% per annum (the equivalent rate agreed to in Clause 3), the interest payable would be $61,000/- per month."

Having silently stood by and allowed the purchasers to find and pay the balance of the purchase price and then wait for another 38 days before insisting on compliance of the requirment to apply to the FIC although the parties had expressly agreed that whether the FIC approval was obtained or not was not to have any effect on the contract is I think the height of inequity. Robert Goff J. stated the principle of this aspect of equitable estoppel in *Societe Italo-Belge* v. *Palm Oils*[9] thus:

"The fundamental principle is that stated by Lord Cairns LC, *viz.* that the representor will not be allowed to enforce his rights where it would be inequitable having regard to the dealings which have thus taken place between the parties. To establish such inequity, it is not necessary to show detriment; indeed, the representee may have benefited from the representation, and yet it may be inequitable, at least without reasonable notice, for the representor to enforce his legal rights. Take the facts of *Central London Property Trust Ltd.* v. *High Trees House Ltd.* (1946) [1956] 1 All E.R. 256, [1947] K.B. 130, the case in which Denning J breathed new life into the doctrine of equitable estoppel. The representation was by a lessor to the effect that he would be content to accept a reduced rent. In such a case, although the lessee has benefited from the reduction in rent, it may well be inequitable for the lessor to insist on his legal right to the unpaid rent, because the lessee has conducted his affairs on the basis that he would only have to pay rent at the lower rate; and a court might well think it right to conclude that only after reasonable notice could the lessor return to charging rent at the higher rate specified in the lease. Furthermore it would be open to the court, in any particular case, to infer from the circumstances of the case that the representee must have conducted his affairs in such a way that it would be inequitable for the representor to enforce his rights, or to do so without resonable notice."

Lord Denning in *W.J. Alan & Co. Ltd.* v. *El Nasr Export & Import Co.*[10] said:

"If one party by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on strict legal rights when it would be inequitable for him to do so."

Another relevant fact in the instant case is the admission by the 4th defendant in his testimony that he had known about a month before March 12, 1982 (the defendants had by a letter of March 12, 1982 purported to repudiate the contract on the ground that FIC approval had not been applied for) that in fact application had not been made for FIC approval. If the defendants were all that concerned about the application for FIC approval, I would have expected them to have made enquiries on the position sometime prior to the completion date January 23, 1982.

Yet another matter is that the least one would have expected is that the purchase price of which $2 million had been with the vendors since 1981 and the balance of $6.1 million since January 23, 1982 would be released with the letter of repudiation. But that was only done about a month later on April 9 when $6.161 million was returned. Explanations were given for the retention of $2 million and for the delay. The explanation for the delay demonstrated a cavalier attitude on the part of the defendants – in fact the behaviour and conduct of the defendants right through showed a cavalier attitude not calculated to weigh in favour of the defendants when the equities are looked at.

This is a case involving the purchase of land by means of the purchase of the shares of the corporation owning the land and as such is a proper case for specific performance. On the facts and for the reasons given herebefore the plaintiffs are entitled to specific performance and to damages for the delay in completing the contract.

Accordingly there will be judgment for the plaintiffs. I order specific performance of the

agreement of October 6, 1981. I further order that the defendants pay damages to the plaintiffs upon assessment of such damages in respect of which assessment directions will be given on application. The defendants will pay the costs of the action and of the assessment of damages.

Order accordingly.

Solicitors : *Zainur & Maydien; Chooi & Co.*

ELF PETROLEUM S.E. ASIA PTE. LTD. v. WINELF PETROLEUM SDN. BHD.

[O.C.J. (George J.) November 6 & 26, 1984]

[Kuala Lumpur – Suit No. C 2360 of 1983]

Contract – Liquidated demand for balances outstanding – Debt not disputed – Liability to pay notwithstanding arbitration clause.

Arbitration – Arbitration clause in an agreement – Claim admitted – No dispute has arisen – Settlement by arbitration not required.

Practice and Procedure – Agreement providing disputes to be tried in a foreign country – Jurisdiction of local courts not ousted.

In this case, the plaintiff, a Singapore company had supplied petroleum products to the defendants. On that account the defendants owed a large sum of money to the plaintiffs. When the plaintiffs demanded payment, the defendants agreed to clear the debt within 5 years. This was not acceptable to the plaintiffs who brought an action against the defendants. The defendants then applied to the court for an order that the writ of summons be struck off because of clause XIII of the agreement under which it was alleged Malaysian courts have no jurisdiction and because of arbitration clause (clause XIV) in the agreement.

Held: (1) parties had agreed that Singapore law would govern any dispute. This did not oust the jurisdiction of the Malaysian Courts to try an action arising out of the agreement;

(2) where a claim is admitted it does not call for a settlement by arbitration.

Cases referred to:

(1) *London & North-Western Rly. Co.* v. *Jones* [1915] 2 K.B. 35.
(2) *The Fehmarn* [1957] 2 All E.R. 707 and [1958] 1 All E.R. 333, C.A.

CIVIL SUIT.

Jagjit Singh for the defendants/applicants.

K.S Narayanan (*Anand Krishnan* with him) for the plaintiff/respondents.

Cur. Adv. Vult.

George J. : The plaintiffs, a Singapore company, had entered into a written agreement dated July 1, 1978 with the defendants, a Malaysian company, in respect of the marketing, selling and distribution in Malaysia of certain petroleum products to be supplied by the Singapore company. Pursuant to the agreement petroleum products were supplied by the plaintiffs to the defendants from time to time and the claim of the plaintiffs is a liquidated demand for the balances outstanding (together with interest thereon) being the price of the said products sold and delivered to the defendants. The plaintiffs also seek an order restraining the defendants from using the word ELF in their trading name.

With their letter of March 21, 1983 the plaintiffs submitted to the defendants the statement of accounts for the month ended February 28, 1983 in respect of the account between the parties; the balances outstanding as shown in the statement were:

(1) Singapore Dollar Account	S$2,427,961.98
(2) Malaysian Ringgit Account	M$1,546,933.42

The said covering letter, a copy of which was exhibit PS2 to the affidavit of Philippe Steff affirmed on September 6, 1983, enclosure (2), states: "If we do not hear from you within *seven (7) days* from the date of this letter, we shall assume that the outstanding figures are in order and correct."

By their letter of March 31, 1983 to the defendants, the plaintiffs purported to terminate the said agreement of July 1, 1978 and reiterated in the letter of termination that the aforesaid amounts on the two accounts were still due and owing. They required the defendants to "kindly let us know how and when do you propose to settle the amounts due to us." The defendants replied to that letter of March 31, 1983 by their letter of May 5, 1983 in which reply they stated that "the two most outstanding issues" between the parties were the current debts of the defendants to the plaintiffs and the prices of petroleum products to